maintain that the term "any claim" in the Tucker Act means precisely what is stated, and that definitive action by this Court is necessary to clarify whether, in the interest of justice, due-process claims against the government should be cognizable in the Federal Court of Claims.

Second, and more significantly, in *Murray*, the appellate court held that although it had no subject-matter jurisdiction for due-process claims, it did have jurisdiction over just-compensation claims. Even given this restrictive scope of jurisdiction, Plaintiffs maintain that the following legal reasoning squarely places all due-process claims within the jurisdiction of the Court of Federal Claims. The citizens of the United States have the right of property, and all rights to the protection thereof, when constitutional provisions are violated. The constitution of the United States is unarguably at its essence a contract between the "compact states," the citizens thereof, and the federal government thereby created. Contractual rights are by definition property rights (Black's Law 6th, p. 1216-7), and the violation of a contractual right by government the taking of property. Therefore, the violation of the due-process clause as a taking of property is automatically actionable under the just-compensation clause. When viewed as trespass against contractual property rights, the rights of the citizenry to the protection of all constitutional provisions must be actionable in the Court of Federal Claims. This Court held, in United States v. Causby, 328 U.S. 256, that

> "We need not decide whether repeated trespasses might give rise to an implied contract. Cf. Portsmouth Co. v. United States, supra. If there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction [**1069] of the Court of Claims to hear and determine. See Hollister v. Benedict Mfg. Co., 113 U.S.

59, 67; Hurley v. Kincaid, 285 U.S. 95, 104; Yearsley v. Ross Construction Co., 309 U.S. 18, 21. Thus, the jurisdiction of the Court of Claims in this case is clear."

3. This case also illuminates a peculiar aspect of domestic law. When confronted with a demand for payment by the IRS, citizens must first pay the amount in demand whether or not said demand is supported by due process before access to a forum for justice, either the Court of Federal Claims or a United States District Court, is granted. The singular significant exception to these rules giving citizens the right to challenge said demands before payment can be accessed only in a court of specialized jurisdiction, the U.S. Tax Court. However, this exception comes with a high price: the citizen must waive the constitutional right of appeal from the decisions of this court. Setting aside considerations of due process previously submitted, Plaintiffs maintain that such a "pay-for-access" structure is a violation of basic human rights. Suppose that a citizen is unable to meet this demand for payment. What chance for justice without waving rights does such a citizen have?

Furthermore, Plaintiffs submit to this Court for consideration the following: there is a distinct difference between having a set of rules, whether simple or complex, and the government meeting its constitutional obligations to protect due-process rights. The existence of the former is not proof positive of the latter. Instead, a higher standard must prevail. The current schema amounts to little more than the government asserting the right of coercion for the extraction of monies *independent* of due process, under a deceptive guise of due process masquerading as a complex set of rules allowing citizens to request refunds.

REASONS FOR GRANTING THE PETITION

1. Jurisprudence in the lower courts to date has effectively emasculated the Tucker Act. It seems clear from the intent of Congress, as stated by this Court in *Mitchell,* that the Court of Claims and its successor the Court of Federal Claims, was to serve as a forum for the citizenry to obtain redress for grievances committed by errant government officials. It also seems clear from the plain language in the Tucker Act that "any claim" means precisely what is stated, and that "any claim" pursuant to the Tucker Act falls under the jurisdiction of the Court of Federal Claims. It is this lower court that should serve as the filtering mechanism for separating claims with merit from those without, and then properly adjudicating them according to the principles of law and justice. Instead, reliance has been placed upon interpretation of the term "founded," which has been taken to confer the burdensome additional requirement of finding substantive law that in effect yields permission for redress of grievances only in very limited circumstances. The reach of this issue extends to all branches of government and all citizens; only action by this Court can resolve the issue.

2. The violation of due process is also an issue with a reach encompassing the rights of every citizen. The significance of government agencies that need not concern themselves with observing due process does not even merit discussion. Furthermore, this case brings to light the treatment of constitutional rights as property rights, and the violation of the former as the taking of the latter. Unless reasoning is dispensed with, when it comes to constitutional provisions, as described above, due process violations are also actionable under the just compensation clause. Jurisdiction for these types of claims should fall squarely with the Court of Federal

Claims. Action by this Court is necessary to address the significant issues raised, and to clarify for the lower courts when they may not refuse jurisdiction of meritorious claims.

3. In the United States, precedence is given to the financial demands of the IRS over the due process rights of the citizens. One may contend that a sufficiently complex set of rules establishing access to a forum for justice to recover monies extracted illegally is a guarantee of due process, but Plaintiffs maintain this is not necessarily so. The extraction of monies upon demand, especially when not based on evidence produced through due process, is abhorrent and inimical to justice. The so-called "pre-payment rule," when complied with by a citizen under threat and especially so when due process has not been observed in the events leading to the demand for payment, should be considered a taking of property, since money is also so defined as property (ref. Black's Law 6th). Hence, the consistent observation of due process leading to payment of monies demanded by the IRS is of utmost importance, not the least reason being that the conditions for the taking of property are described in the Fifth Amendment. Plaintiffs maintain that demand for the payment of alleged tax obligations should at the very least be supported by evidence arrived at through due process, and that violations of due process should automatically be considered as prejudicial against the demander of monies. Action by this Court is necessary to determine whether existing precedence is, in fact, just, and to elucidate precisely what legal principles are in application allowing the IRS to make such demands.

CONCLUSION

As this petition addresses several critical issues concerning the applicability of the Fifth Amendment and property rights, this petition for a writ of certiorari should be granted.

Respectfully submitted.

Timmy C. Riggle
Petitioner

Kelly A. Riggle
Petitioner

9431 Crestmore Way
Highlands Ranch,
Colorado 80126
(303)791-6544

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED:
05/04/05

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and petitions for rehearing en baric. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellants(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely tiled objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs

should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 clays from the date the final mandate is issued.

<signature>
JAN HORBALY
Clerk

cc: TIMMY C. RIGGLE. KELLY A. RIGGLE
CURTIS C. PETT

RIGGLE V US, 05-5026
CFC - 04-CV-1095

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

05-5026

TIMMY C. RIGGLE and
KELLY A. RIGGLE,

Plaintiffs-Appellants

, v.

UNITED STATES,

Defendant- Appellee.

DECIDED: May 4. 2005

Before MICHEL, Chief Judge. RADER. and BRYSON, Circuit Judges. PER CURIAM.

DECISION

Timmy C and Kelly A, Riggle appeal from a decision of the United States Court of Federal Claims dismissing their complaint for lack of subject matter jurisdiction. We affirm.

BACKGROUND

On April 7, 2004, the Internal Revenue Service ("IRS") sent the Riggles a notice of deficiency for the 2000 tax year. The

deficiency was due in part to the IRS's unfavorable treatment of certain partnership income and losses reflected in the Riggles' form 1040. On that same day the IRS sent Mr. Riggle a notice of final partnership administrative adjustment. In the notice of deficiency, the IRS advised the Riggles that they could contest the deficiency by filing a petition in the United States Tax Court within 90 days. The notice of deficiency did not contain any reference to litigating a tax dispute in either a United States district court or the Court of Federal Claims. In the notice of final partnership administrative adjustment, the IRS advised Mr. Riggle of all three options and explained that he must deposit the tax due before filing a petition with either a district court or the Court of Federal Claims.

The Riggles did not pay the deficiency or contest it in the Tax Court. Instead, the Riggles filed a complaint in the Court of Federal Claims alleging that the IRS had improperly disallowed their deductions and had violated their due process rights. Riggle v. United States, No. 05-5026. The IRS moved to dismiss the Riggles' claims for lack of jurisdiction, and the Court of Federal Claims granted the motion, dismissing both claims. This appeal followed.

DISCUSSION

The Tucker Act gives the Court of Federal Claims jurisdiction over claims "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . or for liquidated or unliquidated damages not sounding in tort." 28 U.S.C. § 1491. Because the jurisdiction of the Court of Federal Claims is limited to actions for the recovery of money damages or unlawful exactions, the court has jurisdiction to adjudicate a tax dispute only in the form of a tax refund action. See Shore v. United States. 9 F.3d 1524, 1526 (Fed. Cir. 1993); Tonasket v. United States. 218 Ct. Cl. 709, 711 (Ct. Cl. 1978); see also Flora v. United States. 357 U.S. 63, 65 (1958) (same rule in actions brought in the district courts under 28 U.S.C. § 1346(a)). Thus, before litigating a tax dispute in the Court of Federal Claims, the taxpayer must first pay the tax, submit a claim for a refund to the IRS, and wait until the IRS either denies the claim or fails to respond to the claim within six months. See 26 U.S.C. §§ 6532(a)(1). 7422(a); United States v. Williams. 514 U.S. 527,533(1995).

The Riggles argue that the IRS consented to jurisdiction in the Court of Federal Claims because the notice of deficiency gave the Court of Federal Claims the right to hear their case. That argument fails not only because the notice of deficiency contains

no language conferring jurisdiction on the Court of Federal Claims but also, and more importantly, because "no action of the parties can confer subject-matter jurisdiction upon a federal court." Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694,702(1982).

The Riggles argue that they were not required to pay the tax due before contesting the deficiency, because prepayment was not required by the notice of deficiency. That argument is also incorrect. The fact that the notice of deficiency did not refer to the requirement that a taxpayer pay the claimed deficiency before suing for a refund in the Court of Federal Claims does not override the statutory limitation on that court's jurisdiction. Moreover, nothing in the notice of deficiency suggested that suit could be brought in the Court of Federal Claims without payment of the deficiency; in fact, the notice of deficiency contained no reference at all to the Court of Federal Claims. It referred instead to the Riggles' right to contest the deficiency in the Tax Court, which does have jurisdiction to consider tax disputes before the amount in dispute is remitted and a request for a refund is made. 26 U.S.C. § 6213.

In their motion for reconsideration in the Court of Federal Claims, the Riggles argued that the notice of final partnership administrative adjustment conferred jurisdiction on the Court of

Federal Claims. The court denied the motion, correctly holding that the statutory requirement to make a payment to the IRS before filing suit applies to their claim based on the notice of final partnership administrative adjustment as well. See 26 U.S.C. § 6226(e).

The Court of Federal Claims was also correct in holding that it lacked jurisdiction to consider the Riggles' due process violation claims. The due process clause of the Fifth Amendment is not a money-mandating provision, and claims under that clause therefore do not fall within the jurisdiction of the Court of Federal Claims under the Tucker Act. See Murray v. United States, 817 F.2d 1580, 1582-83 (Fed. Cir. 1987). The Riggles argue that Murray does not apply to their case because the IRS stipulated to jurisdiction in the Court of Federal Claims. As noted above, however, the IRS could not create jurisdiction in the Court of Federal Claims by stipulation, and in any event, we find no indication that the IRS purported to enter into any such stipulation.

The Riggles argue that if the Court of Federal Claims lacks jurisdiction over their claims, they are left without legal recourse to contest the deficiency. We disagree. The Riggles had 90 days from the date on the notice of deficiency to file a petition with the United States Tax Court challenging the deficiency. Even though the time for filing a challenge in that court has expired, the Riggles can still

pay the deficiency, request a refund, and proceed in the Court of Federal Claims if the IRS denies that request.

In their reply brief in this court the Riggles make additional arguments that were not made in their opening brief or in the Court of Federal Claims. Arguments not made in an opening brief are normally considered waived, as are arguments not made in the court or tribunal whose order is under review. See, e.g., Hannon v. Dep't of Justice, 234 F.3d 674, 680 (Fed. Cir. 2000) (arguments made after the opening appeal brief that are not in the opening brief come too late to be considered); Caterpillar Inc. v. Sturman Indus., Inc., 387 F.3d 1358, 1368 (Fed. Cir. 2004) (a party who fails to make an argument at trial waives that argument on appeal). Because there are no exceptional circumstances in this case warranting a departure from that general rule, we decline to address the new arguments made for the first time in the Riggles' reply brief.

APPENDIX B

Tucker Act

28 U.S.C. §1491

Claims against United States generally.

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2)

Supreme Court, U.S.
FILED

05-392 AUG 1 - 2005

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

Timmy C. Riggle, Kelly A. Riggle, PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION OF WRIT OF CERTIORARI

Timmy C. Riggle
Petitioner

Kelly A. Riggle
Petitioner

9431 Crestmore Way
Highlands Ranch,
Colorado 80126
(303)791-6544

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ORDER OF DISMISSAL

In the United States Court of Federal Claims

No. 04-1095T

(Filed: October 20, 2004)

****

TIMMY C. RIGGLE and
KELLY A. RIGGLE,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

****

ORDER OF DISMISSAL

Pending in this tax matter is defendant's motion to dismiss. Plaintiffs filed their response on September 24, 2004. Defendant has replied. Oral argument is deemed unnecessary. For good cause shown, the motion is granted.

The complaint consists of two brief statements: "Defendants violated the plaintiffs' due process.... Defendants illegally disallowed plaintiffs' deductions.... " As defendant correctly points out, the court cannot hear a claim based

exclusively on an alleged violation of plaintiffs' fifth amendment due process rights. *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987), cert. denied, 489 U.S. 1055 (1989).

With respect to the second claim — "illegally disallowing" a claimed deduction — the complaint is defective for failure to comply with RCFC 9(h)(6). The purpose of that rule is to ensure that the complaint is predicated on a refund claim, which should be attached. Plaintiffs apparently have received a deficiency notice, but they have not alleged payment of the disputed tax, the requisite to suit here, as opposed to the Tax Court. Further, there is no refund claim attached to the complaint and no other relevant information furnished. Finally, we see no purpose in inviting an amendment to the complaint because it is apparent from the attachments and plaintiffs' response that no refund claim has yet been filed with the IRS. The court's jurisdiction over tax refund claims is not triggered unless such a claim has first been filed. See 26 U.S.C. § 7422(a) (2000); *United States v. Williams*, 514 U.S. 527, 533 (1995).

The Clerk is directed to dismiss the complaint without prejudice pursuant to RCFC 12(b)(1) for lack of jurisdiction. No costs.

ERIC G. BRUGGINK
Judge

ORDER ON RECONSIDERATION

In the United States Court of Federal Claims

No. 04-1095T

(Filed: November 12, 2004)

****

TIMMY C. RIGGLE and
KELLY A. RIGGLE,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

****

ORDER ON RECONSIDERATION

Pending in this tax matter is plaintiffs' motion to reconsider. We granted defendant's motion to dismiss pursuant to RCFC 12(b)(1) on October 20,2004, ruling that this court lacked jurisdiction because plaintiffs' complaint was not predicated on a refund claim. Plaintiffs filed their motion to reconsider on November 1, 2004. No response is deemed necessary. The motion is denied.

Plaintiffs request that the court reconsider its prior order to dismiss "on the grounds that on April 7th, 2004, [p]laintiff's [sic] received ... 'A Notice of Deficiency'... accompanied by a document titled and attached 'Notice of Final Partnership Administrative Adjustment'" which stated that plaintiffs could file a petition for readjustment of partnership items with this court, among others. It is apparent from the motion and its attachments that Mr. Riggle is a partner[1] of both Farris Enterprise and Furrow Venture. Plaintiffs challenge the final partnership administrative adjustments for those partnerships.

Plaintiffs' complaint is defective for failure to comply with both 26 U.S.C. § 6226(e) (2000) and RCFC app. F, R.l(c) (Procedure in Tax Partnership Cases) (2002). Rule l(c) mirrors the requirements of § 6226(e) and mandates the following: (1) "a complaint for readjustment of partnership items is filed with the court by the tax matters partner within the period specified in Code Section 6226(a), or by a notice partner (or 5 percent group) subject to the conditions and within the period specified in Code Section 6226(b)"; and (2) "the partner or partners filing the complaint make a deposit as required by Code Section 6226(e)." Neither the complaint nor the motion to reconsider alleges that the requisite deposit has been made. Further, the materials provided with plaintiffs' motion show no evidence of such a deposit. Without the requisite

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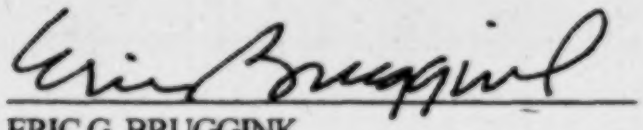
[1] Both notices of final partnership administrative adjustment are addressed to plaintiff Timmy C. Riggle. The notices refer to Mr. Riggle as the tax matters partner.

deposit, this court lacks jurisdiction and the motion must be denied.



ERIC G. BRUGGINK
Judge